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BEFORE THE ARIZONA CORPORATION COMMISSION RECEIVED

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IN THE MATTER OF QWEST  
CORPORATION'S COMPLIANCE WITH  
SECTION 252(e) OF THE  
TELECOMMUNICATIONS ACT OF 1996.

Docket No. RT-00000F-02-0271

## RUCO'S NOTICE OF FILING

The Residential Utility Consumer Office ("RUCO") respectfully provides notice of filing the Minnesota's Public Utilities Commission's Order Assessing Penalties, a copy of which is attached hereto.

RESPECTFULLY SUBMITTED this 3<sup>rd</sup> day of March, 2003.

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1 AN ORIGINAL AND THIRTEEN COPIES  
2 of the foregoing filed this 3<sup>rd</sup> day  
3 of March, 2003 with:

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BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendraye  
Ellen Gavin  
Marshall Johnson  
Phyllis A. Reha  
Gregory Scott

Chair  
Commissioner  
Commissioner  
Commissioner  
Commissioner

In the Matter of the Complaint of the  
Minnesota Department of Commerce Against  
Qwest Corporation Regarding Unfiled  
Agreements

ISSUE DATE: February 28, 2003

DOCKET NO. P-421/C-02-197

ORDER ASSESSING PENALTIES

**PROCEDURAL HISTORY**

On February 14, 2002, the Commission received a complaint against Qwest Corporation (Qwest) filed by the Minnesota Department of Commerce (the Department) pursuant to Minn. Stat. 237.462. The complaint alleged that Qwest, in neglecting to make public and seek Commission approval for eleven interconnection agreements with various competitive local exchange carriers (CLECs), has acted in a discriminatory and anti-competitive manner. The complaint was ultimately amended to include a twelfth agreement.

On March 12, 2002, the Commission in its NOTICE AND ORDER FOR HEARING referred the matter to the Office of Administrative Hearings for a contested case proceeding.

On September 20, 2002, Administrative Law Judge (ALJ) Allan W. Klein submitted his Findings of Fact, Conclusions, Recommendation and Memorandum (ALJ Report) to the Commission.

On November 1, 2002, the Commission issued its ORDER ADOPTING ALJ'S REPORT AND ESTABLISHING COMMENT PERIOD REGARDING REMEDIES. The Commission found that Qwest knowingly and intentionally violated federal and state law and established a comment period to address possible remedies.

On November 19, 2002, the Commission met to consider possible remedies.

On December 18, 2002, the Commission issued its ORDER REQUIRING PLAN AND AUTHORIZING COMMENTS wherein the Commission ordered Qwest to file proposed plans with respect to remedies which would further competition in Minnesota.

On December 19, 2002, Qwest filed its proposed remedies. Responses to Qwest's proposal were filed by numerous parties:

Minnesota Department of Commerce	Minnesota Department of Administration
Northwestern Bell/ US West Retiree Association	Suburban Rate Authority
Minnesota Municipal Utilities Association	Minnesota Office of the Attorney General - Residential and Small Business Utilities Division (RUD-OAG)
CLEC Coalition <sup>1</sup>	AT&T
MCI WorldCom	Time Warner Telecom
Wholesale Service Quality Coalition <sup>2</sup>	Onvoy

The Commission also received comments from a number of Minnesota businesses and communities. These comments are part of the record available to the Commission and to any member of the public wishing to review them.

The Commission met on February 4, 2003 to consider this matter.

## **FINDINGS AND CONCLUSIONS**

### **I. INTRODUCTION**

In its November 1, 2002 Order in this matter, the Commission adopted the ALJ's report in its entirety, including the Administrative Law Judge's (ALJ's) findings that Qwest knowingly and intentionally violated federal law for each of 26 interconnection terms or groupings of terms. Order at page 3.

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<sup>1</sup> **CLEC Coalition:** This coalition comprises the following 12 CLECs: Ace Telephone, Hickory Tech, HomeTown Solutions, Hutchinson Telecommunications, Mainstreet Communications, NorthStar Access, Otter Tail Telecom, Paul Bunyan Rural Telephone Cooperative, Tekstar Communications, Unitel Communications, US Link, and 702 Communications.

<sup>2</sup> **Wholesale Service Quality Coalition (WSQ Coalition):** This coalition is distinct from the CLEC Coalition, although some parties are members of both coalitions. The WSQ Coalition consists of 13 parties: the Department of Commerce, AT&T, Covad, Eschelon, Global Crossing, McLeodUSA, New Edge Networks, Onvoy, WorldCom, Encore, NorthStar Access, US Link, and Time Warner.

The Commission also found, based on the same findings of fact, that Qwest knowingly and intentionally violated Minn. Stat. § 237.09, Minn. Stat. § 237.121, subd. 5, and Minn. Stat. § 237.60, subd. 3. Order at page 6.

The Commission also adopted the ALJ's finding that the Department has demonstrated by a preponderance of the evidence that a penalty is justified under Minn. Stat. § 237.462, subdivisions 2 and 3. Order at page 7.

Moving to a Penalty Phase in succeeding months, the Commission has received and considered recommendations and comments from the parties regarding the size and nature of the penalties and has conducted two hearings to receive parties' comments. In this Order, the Commission sets forth its Penalty Phase decision and rationale.

An Order assessing penalties under Minn. Stat. § 237.462, such as the current Order, includes

- (1) a concise statement of the facts alleged to constitute a violation;
- (2) a reference to the section of the statute, rule, or order that has been violated;
- (3) a statement of the amount of the administrative penalty to be imposed and the factors upon which the penalty is based; and
- (4) a statement of the person's right to review of the order. Minn. Stat. § 237.462.

## **II. QWEST'S VIOLATIONS**

### **A. Failure to File: Violation of 47 U.S.C. § 252(a) and (e)**

47 U.S.C. § 252(a) and (e) required Qwest to file interconnection agreements with the Commission. The ALJ found and the record shows that Qwest made eleven written agreements with various CLECs that Qwest had not filed with the Commission for approval before the Department brought its complaint and one oral agreement between Qwest and McLeodUSA (McLeod) that Qwest has never reduced to writing and submitted to the Commission for approval. By failing to file these agreements, Qwest violated 47 U.S.C. § 252(a) and (e).

### **B. Discriminatory Conditions on Resale: Violation of 47 U.S.C. § 251(b)(1)**

47 U.S.C. § 251(b)(1) prohibits local exchange companies (LECs) such as Qwest from imposing unreasonable or discriminatory conditions on resale and 47 U.S.C. § 251(c)(2)(D) requires LECs to provide interconnection on rates, terms and conditions that are nondiscriminatory. In addition, 47 U.S.C. § 251(c)(3) requires incumbent LECs such as Qwest to provide access to network elements on an unbundled basis on rates, terms, and conditions that are nondiscriminatory.

The ALJ found and the record shows that in each of the twelve interconnection agreements cited by the Department, Qwest provided terms, conditions, or rates to certain CLECs that were better than



the terms, rates and conditions that it made available to the other CLECs and, in fact, kept those better terms, conditions, and rates a secret from the other CLECs. In so doing, Qwest unquestionably treated those select CLECs better than the other CLECs, thereby discriminating against them in violation of the cited provisions of Section 251.

### **C. Violation of State Anti-Discrimination Statutes**

As the Commission found in its November 1, 2002 Order adopting the ALJ's Report, Minn. Stat. § 237.09 and § 237.60, subd. 3 prohibit discrimination in the provision of intrastate service and Minn. Stat. § 237.121, subd. 5 prohibits a telephone company from imposing "unreasonable or discriminatory restrictions on the resale of its services." The ALJ found and the record supports the Commission's finding that Qwest has provided preferential treatment to some CLECs in violation of federal law. The discriminatory actions cited also violate the above-cited Minnesota statutes because the discriminatory activity is the same (providing preferential treatment to some CLECs) and the local service affected is clearly intrastate service. Qwest's activity withholding from most CLECs the favorable terms offered to others also violates the "unreasonable restriction on resale" provision of Minn. Stat. § 237.121, subd. 5. See Order at page 6.

## **III. AMOUNT OF PENALTY IMPOSED**

The Commission has reviewed the record, including the filings of the parties specifically on penalty issues, in light of the factors that Minn. Stat. § 237.462, subd. 2 directs it to consider in setting penalty amounts. Having completed this review, the Commission will assess a penalty of \$10,000 per day for two of the unfiled agreements that had the greatest anti-competitive and discriminatory negative impact (Eschelon IV and McLeod III) and \$2,500 per day for the remaining 10 unfiled agreements for a total of \$25.95 million.<sup>3</sup>

The distinction in penalty levels for the various agreements is justified because while failure to file all the agreements was serious and warrants a significant penalty, as discussion of the statutory factors applicable to all the agreements shows, failure to file the Eschelon IV and McLeod III agreements disadvantaged the other CLECs on a much larger scale. Therefore, Qwest's knowing and intentional failure to file these two agreements warrants the highest per day penalty allowed. Distinguishing characteristics of these two agreements are set forth below.

**Eschelon IV** - Qwest agreed to provide Eschelon with a 10 percent discount on all the aggregate billed charges for all purchases made by Eschelon from Qwest from November 15, 2000 through

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<sup>3</sup> Total violation days for Eschelon IV and McLeod III were 1,165, as delineated below, times \$10,000 per violation day equals \$11,650,000. Total violation days for the remaining agreements was 5,722, as delineated below, times \$2,500 per violation day equals \$14,305,000. Total penalty for all 12 agreements, therefore, is \$25,955,000.

December 31, 2005. In addition, a "consulting" arrangement contained in the agreement was a sham designed to conceal the discount that Qwest agreed to provide Eschelon. See ALJ's Report, Findings 124-130, pages 21-22.

**McLeod III** - Qwest entered an oral agreement with McLeod to provide discounts ranging from 6.5-10 percent depending on the volume of McLeod's purchases over the course of the year. The discount applied to McLeod's purchases of unbundled network elements (UNEs), payments for switched access, wholesale long distance and tariffed retail services. Testimony of a Qwest witness continuing to deny the existence of the discount agreement was found not credible. See ALJ's Report, Findings 316-345, pages 43-47.

In these agreements, Qwest provided discriminatory monetary advantages to these two CLECs far surpassing the advantages conferred by the other agreements (and, conversely, disadvantaged the other CLECs that much more deeply).

The violation day count for each agreement and calculation of the total penalty for all 12 agreements are as follows:

1. \$10,000 per violation day for the most egregious behavior, the Eschelon IV and McLeod III unfiled agreements, and \$2,500 per day for each of the remaining 10 unfiled agreements.<sup>4</sup> The Eschelon IV and McLeod III unfiled agreements involve the most serious violations by far. While all the unfiled agreements are patently discriminatory on their face and violated laws intended to protect fledgling competitors and competition in the local telephone industry and the ratepayers who are to benefit from that competition, the Eschelon IV and McLeod III violations warrant the maximum penalty allowable under the law because by giving selected CLECs such a significant price edge over their competitors (the 10% discount), they had the potential to cause the most serious damage to competition. The intentional violations connected to the 10 other unfiled agreements are also serious and damaging, but to a lesser extent. The Commission concludes that they warrant a substantial but lesser penalty amount: \$2,500 per violation day.
2. For the Eschelon IV and McLeod III unfiled agreements, the violation days began on the day each was made (11/15/00 and 10/26/00, respectively) and ran until 3/1/02 and 9/20/02, 471 days and 694 days, respectively, for a total of 1,165 violation days.

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<sup>4</sup> Some of the agreements contained multiple violations, but the Commission will accept Qwest's suggestion and assess the penalty for each agreement that was not filed rather than for each violation contained therein.

Name of Agreement	Start Date <sup>5</sup>	End Date	Number of Violation Days
1. Eschelon IV	11/15/00	03/01/02 <sup>6</sup>	471
2. McLeod III (oral agreement)	10/26/00	09/20/02 <sup>7</sup>	694
<b>TOTAL</b>			1,165

3. For the remaining 10 unfilled agreements, the 5,722 violation days attributable to these agreements are calculated as follows:

Name of Agreement	Start Date	End Date	Number of Violation Days
1. Eschelon I	02/28/00	03/01/02	732
2. Eschelon II	07/21/00	03/01/02	588
3. Eschelon III	11/15/00	03/01/02	471
4. Eschelon V	07/03/01	03/01/02	241
5. Eschelon VI	07/31/01	03/01/02	213
6. Covad	04/19/00	03/01/02	681
7. Small CLECs	04/28/00	03/01/02	672
8. McLeod I	04/28/00	03/01/02	672
9. McLeod II	10/26/00	03/01/02	491
10. US Link/ InfoTel	07/14/99	03/01/02	961
<b>TOTAL</b>			5,722

<sup>5</sup> The Start Dates used in these calculations are the dates found by the ALJ as part of his Report and Recommendations. No party has challenged the Start Dates found by the ALJ for the 11 written agreements.

<sup>6</sup> The End Date March 1, 2001 is the date that Qwest, following the Department's complaint that Qwest had failed to file certain interconnection agreements as required by law, filed selected portions of 11 written but theretofore unfilled agreements.

<sup>7</sup> The End Date September 20, 2002 is the date that the Administrative Law Judge issued his Report and Recommendations in this matter, finding (among other things) the existence of this oral agreement between Qwest and McLeod.

### III. STATUTORY FACTORS CONSIDERED

The penalty amount set forth in the preceding section is based upon consideration of the factors set forth in Minn. Stat. § 237.462, subdivision 3. The Commission's consideration of these factors follows.

#### **Factor 1: Wilfulness or intent of the violation**

The degree of Qwest's wilfulness and intent to violate the cited anti-competitive laws was quite high. The record indicates that Qwest's activities were not isolated, spur-of-the-moment decisions by entry-level personnel but were taken in a calculating and deliberate manner by experienced, high-ranking Qwest officials. Qwest has defended these actions as being the result of confusion over what the law required. This defense has no merit.<sup>8</sup>

Contrary to Qwest's assertion in this matter, the type of agreements that are required to be filed under 47 U.S.C. §§ 251(a) and (e) was clear at the time Qwest chose not to file these agreements, based on the plain language of the federal law. Qwest's argument that its employees did not file these agreements because they were confused or had a good faith different view regarding the meaning of the law and their responsibilities under the law is not supported in the record and, in light of the plain language of the law, is not credible.<sup>9</sup>

In these circumstances, it is unmistakable that Qwest knowingly and intentionally violated 47 U.S.C. §§ 252(a) and (e) because Qwest knew that the referenced statutes required the Company to file these agreements with the Commission and the Company intentionally did not make the required filing.<sup>10</sup> Likewise, there is no question that Qwest knew that it was extending special

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<sup>8</sup> See ALJ Report in which he reviewed the ways Qwest was unmistakably on notice of the requirement to file these agreements (Finding Nos. 6-28) and concluded, with respect to each unfiled agreement, that Qwest acted knowingly and intentionally in failing to file these interconnection agreements and in discriminating against the disfavored CLECs. See ALJ Findings cited in footnotes 10 and 11.

<sup>9</sup> As the ALJ found, a common understanding of what must be filed (interconnection agreements) and what constitutes an interconnection agreement is shared by the Department, AT&T, the Residential and Small Business Utilities Division of the Office of the Attorney General (RUD-OAG), the Iowa Utilities Board and even reflected in Qwest's own SGAT (Section 4). ALJ Report, Finding of Fact #28. The validity and accessibility of this understanding is further confirmed by the FCC's October 4, 2002 Memorandum Opinion and Order in which the FCC articulated a filing standard virtually identical to the standard stated by the ALJ, stating that its articulated standard "flows directly from the statute." Memorandum Opinion and Order, Paragraph 10. See WC Docket No. 02-89.

<sup>10</sup> See ALJ's Report, Finding Nos. 45, 58, 65, 75, 86, 103, 114, 138, 148, 165, 184, 196, 205, 213, 221, 229, 240, 248, 256, 264, 281, 290, 302, 311, 342, and 353.

terms to the select CLECs and that it was keeping these terms secret from CLECs in general.<sup>11</sup> These discriminatory actions were taken with the clear intention to favoring some CLECs at the expense of other CLECs, reflecting a high degree of intentionality on the part of Qwest.

## **Factor 2. The gravity of the violations**

State and federal telecommunications law has undertaken to promote competition in the local telephone market. Central to the fair development of competition in the local telephone market is the legal requirement (state and federal) that the terms and conditions that the incumbent carrier (Qwest) makes available to any local telephone provider will be made available across-the-board to all local service providers. Qwest's making secret deals with selected CLECs strikes to the heart of the government's determination to protect developing local competition.

In addition, some of Qwest's secret deals that violated state and federal law also sought to subvert the regulatory process by buying the silence of certain CLECs on matters before the Commission (US West merger with Qwest and Qwest's 271 application) and the FCC (Qwest's 271 application).<sup>12</sup> A relevant issue in both the merger and Qwest's 271 application is whether Qwest

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<sup>11</sup> See ALJ's Report, Finding Nos. 46, 59, 67, 77, 88, 105, 117, 140, 150, 167, 187, 198, 207, 215, 223, 231, 242, 250, 258, 266, 282, 291, 304, 313, 344, and 354.

<sup>12</sup> Eschelon I, Paragraph 16 - Eschelon agrees not to oppose Qwest merger; Eschelon III, 2nd Paragraph of Section 1 - Eschelon agrees not to oppose Qwest's efforts to obtain 271 authority; Covad (last paragraph) - Covad agrees to withdraw opposition to Qwest merger; Small CLECs, Paragraph 3 of the Recitals - 10 CLECs agree not to oppose merger and to encourage expeditious processing and review; McLeod I, Paragraph 1, page 2 - McLeodUSA agrees to withdraw opposition to Qwest merger; and McLeod III (oral agreement) - McLeodUSA agrees not to oppose Qwest's efforts to obtain 271 authority. See ALJ Report, Finding Nos. 361-363.

has fairly and adequately opened the Minnesota telephone market to competitors.<sup>13</sup> Qwest's unfiled agreements with Eschelon, McLeod, Covad, and 10 Small CLECs sought to secure the silence of those companies, thereby skewing the regulatory record. The gravity of Qwest's actions in so doing can be likened to bribing potential witnesses not to report what they saw to an administrative body.<sup>14</sup>

While Qwest's activity buying silence injured the regulatory process in general and is reprehensible as such, the relevant consideration for this proceeding (penalty assessment) is that it also directly harmed the disfavored CLECs in an anti-competitive and discriminatory manner. Qwest removed valuable sources of input regarding actual commercial usage and issues that major CLECs were dealing with at the time. It is reasonable to assume, as Qwest apparently believed, that McLeod and Eschelon's information would have generally hurt Qwest's position and helped the CLECs' position. By keeping relevant information from regulators, Qwest sought to skew the process in its favor, all to the detriment of the disfavored CLECs who, due to Qwest's actions, would not be receiving the benefits of proper regulatory process.

Furthermore, CLECs have been harmed monetarily and customers have been harmed by Qwest impeding fair competition in this manner. The direct and inevitable result of such anti-competitive behavior is that customers have been deprived of the benefit of a market place fairly and freely open

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<sup>13</sup> The Telecommunications Act of 1996 authorizes a Bell Operating Company (BOC) such as Qwest to enter in-region interLATA and interstate telecommunications services (the long distance telecommunications market) upon compliance with certain provisions of 47 U.S.C. §271. Section 271 requires the Federal Communications Commission (FCC) to make certain findings before approving a BOC application, including the following: 1) the BOC has fully satisfied each competitive checklist item contained in §271(c)(2)(B); 2) the BOC's requested authorization will be carried out in accordance with the requirements of §272; and 3) the BOC's entry is consistent with the public interest, convenience, and necessity.

As part of its 271 application, Qwest must make state-specific evidentiary showings and separately identify each state's relevant performance data. The Commission has the responsibility under §271(d)(2)(B) to advise the FCC whether Qwest meets the fourteen point competitive checklist. The FCC has asked the state commissions to fully develop a factual record regarding the BOC's compliance with the requirements of section 271 and the status of local competition. The Commission has several current dockets assessing Qwest's 271 application, including Docket Nos. P-421/CI-01-1370 (the six non-OSS competitive checklist items); P-421/CI-01-1371 (the eight OSS competitive checklist items); and P-412/CI-01-1373 (public interest, convenience and necessity considerations).

<sup>14</sup> Of particular note, Qwest's purchase of neutrality from Eschelon and McLeod in the 271 process sought to eliminate any relevant information and insights throughout 271 related proceedings from two of Qwest's largest competitors on issues that Eschelon and McLeod could be reasonably expected to have relevant information and views, including the Regional Oversight Committee-Operational Support Systems (ROC-OSS) test and final report and the OSS-related Commission Docket No. P-421/CI-01-1371.

to competition. While this harm may not be quantified in terms of dollars and cents, the first fruits of competition (lower prices and wider choices) were undoubtedly impacted by Qwest's anti-competitive and discriminatory behavior.

- **Example of the impact on price:** CLECs not getting the 10% discount obviously could not offer their products at a price reflecting that discount. They were, therefore, at a competitive disadvantage vis a vis the favored CLECs. This discriminatory treatment hurt both the unfavored CLECs and their customers.
- **Example of impact on choice:** CLECs not receiving the 10% discount were inhibited from expanding their local marketing efforts and potentially discouraged from entering the Minnesota local market, thereby reducing customer choice.

Finally, the gravity of the violation is judged as much by what it intended to accomplish as by quantifying the monetary harm. In this case, the Commission concludes that Qwest intended to disadvantage certain CLECs, its competitors, through illegal means. That is a grave matter.

### **Factor 3: History of Past Violations**

This is not the first time that the Commission has had to fine Qwest for knowingly and intentionally thwarting competition in the Minnesota local market. In Docket No. P-421/C-01-391, the Commission found that Qwest knowingly and intentionally violated its obligation to act in good faith under its interconnection agreement with AT&T by

- a) creating a specious position to support its refusal to conduct AT&T's UNE-P test, when that refusal was actually based on Qwest's retail business interests;
- b) imposing its position regarding its testing obligations upon AT&T, whether specious or correct, without informing AT&T, by delaying AT&T's opportunity to challenge that position, by concealing its true intent to allow only certification testing, and by attempting to avoid and by delaying the UNE-P test by engaging AT&T in long and unnecessarily difficult negotiations over UNE-P testing that Qwest never intended to allow...; and
- c) sending the letter of August 29, 2001, to AT&T making false and misleading statements.<sup>15</sup>

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<sup>15</sup> See *In the Matter of the Complaint of AT&T Communications of the Midwest, Inc. Against Qwest Corporation*, Docket No. P-421/C-01-391, ORDER ASSESSING PENALTIES (June 18, 2002), page 9.

The specific laws Qwest violated regarding AT&T are not the ones involved in this case, but the effect and intent of Qwest's knowing and intentional actions (to benefit itself, to disadvantage its competitors, and to harm competition) is a common thread, and the harm resulting to competitors, to the competitive market, and to consumers is similar.

Also similar in both cases, the Commission found that Qwest's actions were not, as Qwest asserted, simply mistaken interpretations of its obligations. In the AT&T complaint docket, the Commission stated at page 10 of its ORDER ASSESSING PENALTIES:

Qwest's determination that it could refuse to engage in the cooperative testing requested by AT&T unless it was satisfied that AT&T was using that testing for market entry was **not simply a mistaken interpretation** of its obligation under the Interconnection Agreement. It was not supported by the terms of the Interconnection Agreement but was a position developed and used by Qwest to prevent AT&T from developing data that AT&T could use to present to regulatory officials in opposition to Qwest's 271 applications. [Footnote omitted.] The Commission recognizes that this was a further example of bad faith on Qwest's part.

Elsewhere in the ORDER ASSESSING PENALTIES, the Commission stated:

Qwest acted unilaterally to delay the testing AT&T requested and eventually determined not to do the testing at all, offering only to do its standard testing. Qwest, as the monopoly power making the decision to proceed in this manner was acting not only to delay AT&T's entry into the market but was effectively keeping AT&T out of the market by dictating what testing was appropriate for AT&T and giving no heed to AT&T's stated testing needs. This was clearly not an appropriate role for Qwest. Not only did it impact AT&T but it also impacted any other CLEC that wanted information that Qwest deemed was not necessary for it to have.

The Commission also notes its concern that Qwest made unilateral decisions without asking the Commission for guidance or assistance. Qwest clearly did not want the Commission involved. It made its own determination of what it was required to provide AT&T without involving the Commission. At one point in the negotiations, AT&T requested that Qwest come to the Commission for a tariff waiver. Qwest refused to ask for such a waiver and subsequently asserted the tariff as a reason for not providing the residential lines AT&T requested. The ALJ found that this reason was "bogus" because Qwest was fully aware of the regulatory process and knew that it was possible to get the waiver. Rather than seeking Commission guidance, Qwest was dictating what could and could not be done by a CLEC to enter the market. This is not acceptable.

In assessing a penalty against Qwest in the amount of \$7,500 per violation day, the Commission justified not levying the maximum amount authorized by statute (\$10,000/day) as follows:



...the Commission will not assess the maximum penalty in this instance, recognizing that Qwest did ultimately cooperate in the testing, thereby mitigating the harm done.<sup>16</sup> However the Commission finds that the serious nature of this occurrence, combined with the harm to consumers and considering the serious effect Qwest's behavior could have on competition, compel the Commission to assess a penalty designed to have an impact on Qwest. For these reasons, the Commission will assess Qwest a penalty of \$7,500 per day for the period beginning January 12, 2001 through May 11, 2001.

Given the gravity of the current violations and their similarity to the previous violations found in the AT&T Complaint, the other items identified for consideration under the "History of Past Violations" heading (number of previous violations found, the response of Qwest to the previous violation identified, and the short time elapsed since the last violation) cast comparatively little light.

#### **Factor 4: The Number of Violations**

In 12 separate unfiled interconnection agreements, Qwest committed 26 individual violations by failing to file, as required, 26 distinct provisions regarding interconnection and access to unbundled network elements (UNEs).

The significant duration of each agreement (the intended duration of the most damaging secret agreement was five years and 6 weeks) indicates Qwest's intention to advantage favored CLECs and disadvantage the non-favored CLECs for a significant period of time.

Likewise, the number of violations and several repeat violations with the same favored CLEC within a relatively short period of time also suggests that these anti-competitive and discriminatory practices were not aberrations but represented a concerted portion of Qwest strategy.

Finally, the number of violations of this sort (unfiled agreements disadvantaging competitors to Qwest's advantage) appears not to have been limited by Qwest's internal moral compass. Instead, it appears that these violations would have continued and multiplied if Qwest had not been apprehended in this activity and brought to light by the Department. These considerations auger for a significant penalty.

#### **Factor 5: the Economic Benefit Gained by the Person Committing the Violation**

Qwest gained several significant advantages for itself from its promises to the CLEC parties to the unfiled agreements. The most significant of these advantages was the promise Qwest obtained from

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<sup>16</sup> Note that in this case by contrast, Qwest has never agreed to offer CLECs the same deals it gave Eschelon and McLeod.

Eschelon and McLeod USA, two of Qwest's largest wholesale customers, to remain neutral (silent) during the consideration of Qwest's Section 271 applications by state and federal regulators.<sup>17</sup>

Qwest undoubtedly benefitted monetarily from the portions of the unfiled agreements that secured silence from certain CLECs regarding Qwest's 271 petition. First: Qwest did not have to deal with objections and complaints from Eschelon and McLeod, two of the largest CLECs in Minnesota, in the context of its 271 petition. This immediately saved Qwest legal and administrative expenses that defending against those objections would entail. Moreover, Qwest clearly believed that purchasing the silence of Eschelon and McLeod enhanced Qwest's chances of a favorable outcome for its 271 petition. While the exact value to Qwest of a successful 271 petition (revenues to be achieved upon re-entry in the long distance market in Minnesota and its 14-state region) has not been established in this docket, there can be no question that its monetary value to Qwest is considerable, given the substantial resources Qwest has invested in that project in Minnesota and elsewhere in its 14-state region.

Qwest benefitted monetarily from the neutrality portions of the unfiled agreement in not having to address in a number of Minnesota dockets the substantial service-related problems experienced by Eschelon. ALJ Finding No. 370, page 51.

Qwest secured guaranteed revenue streams of \$150,000,000 from Eschelon and a significant sum from McLeod as part of its unfiled discount agreements. By entering into the unfiled discount argument with McLeod, Qwest also secured McLeod's commitment not to remove its telecommunications traffic from Qwest's network. ALJ's Finding No. 317, page 51.

By concealing both discount agreements and keeping them unavailable to other CLECs, Qwest benefitted by saving several million dollars in Minnesota alone. ALJ Finding No. 372, page 51.

#### **Factor 6: Corrective Actions Taken or Planned**

The Commission believes that what has been most damaged by Qwest's anti-competitive behavior is the competitive environment in Minnesota and more concretely, Minnesota CLECs.

The ALJ concluded:

Qwest has not taken meaningful corrective action to remedy the harm caused by failing to file the specific agreements cited in the complaint. Qwest does intend to seek Commission consideration of a subset of the provisions complained about here, but only if the Commission first determines that it must. ALJ Report, Paragraph 380, page 52.

Following its adoption of the ALJ's Report, the Commission has given Qwest two opportunities in the Penalty Phase of this proceeding to propose corrective actions (penalties). The actions proposed to be taken by Qwest in its Penalty Phase filings fail to address the identified harms and their root.

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<sup>17</sup> See ALJ's Report, Paragraph 369, page 51.

Moreover, Qwest's proposals fail to take responsibility for its anti-competitive and discriminatory behavior and may, as the following analysis shows, actually serve to retard, rather than restore, competition in Minnesota. The components of Qwest's proposed penalty package are evaluated as follows.

### **1. Opt-in**

Qwest proposed to allow CLECs to opt-in to 21 of the 26 initially unfilled provisions, waiving the procedures that require Commission approval. For the remaining five provisions, Qwest states that it will make these provisions available for opt-in to any Minnesota CLEC that has the same disputes and has not reached alternative resolution. Qwest's proposal was not the same as the terms in the agreements that included both interstate and intrastate services and which covered all states in Qwest's region for both interstate and intrastate services. While Qwest's proposal has some value, making the 26 provisions available is clearly preferable to Qwest's proposal, as part of a restitutional remedy. See discussion below.

### **2. Ten Percent Discount/Credit**

Qwest proposed to give CLECs credit against future purchases of an amount equal to 10% of their purchases of Section 251(b) or (c) items in Minnesota under any interconnection agreement or Statement of General Available Terms (SGAT) during the time period from January 1, 2001 through June 30, 2002. Qwest stated that Eschelon and McLeod would not be eligible for this credit.

Qwest's proposal would restore some of the detriment caused to CLECs and therefore contribute to undoing the anti-competitive effects of its actions. However, it is also similar to agreeing to put back some but not all of the candy taken from the grocery store and as such cannot be considered a penalty.

### **3. Wholesale Service Quality Standards**

As part of this Penalties Phase, Qwest proposed wholesale service quality standards that are inferior to certain aspects of the Minnesota Performance Assurance Plan (MPAP) adopted by the Commission on November 26, 2002 in Docket No. P-421/AM-01-1376. In addition, Qwest's proposed standards are inferior to standards developed by the Department and a coalition of CLECs and now currently before the Commission for adoption in the Wholesale Service Quality Standards proceeding. Docket No. P-421/AM-00-849. Adoption of the lower standards proposed by Qwest in this Penalty Phase would conflict with the Commission's MPAP decision and improperly preempt a decision soon to be made on the record established in the Wholesale Service Quality Docket.

### **4. Minnesota Liaison**

Qwest proposed to make a designated executive available to Minnesota CLECs to serve as a liaison if the normal reporting hierarchy is not successful in resolving disputes. Since most interconnection agreements currently have an escalation process, Qwest's proposal has value beyond current practices only if the liaison is granted authority to make decisions and resolve the complaint in a

timely manner. It would be time-consuming to track the success of this proposal, whose effectiveness would only be shown by a fact-intensive analysis over a long period of time. In these circumstances, the proposal has marginal value as a penalty or to restore/enhance the competitive market place.

## **5. Review Committee and Independent Auditor**

Qwest announced a number of changes to its internal decision-making procedures to ensure future compliance with all the legal requirements at issue in this proceeding. Qwest suggested that a new "filing standard" will help, that these mistakes were made due to inexperience, and that this will not happen once "experienced regulatory and legal personnel" are involved, and that restructuring the Wholesale Business Development Department is key to this not happening again.

Any changes Qwest needs to ensure that it complies with the law would be a benefit to Qwest and can hardly be viewed as a penalty. Moreover, reporting these changes as necessary to comply with the law simply continues Qwest's unfounded defense that its failure to file the agreements in question was the result of confusion or ambiguity about what the law required. Emphasizing these changes continues Qwest's pattern of denial regarding the knowing and intentional violations of the law found by the ALJ and the Commission in this matter.<sup>18</sup>

## **6. Voicemail to CLECs**

Qwest proposed to provide CLECs the opportunity to purchase voicemail at retail prices from Qwest for use in conjunction with the CLEC's UNE-P functions for the next three years. The benefit to CLECs over the status quo is limited since existing law arguably requires the provision of voicemail to CLECs at retail prices. In addition, Qwest's proposal is limited to three years.

While Qwest's proposal may reduce the barriers to competition for the three-year period, the three-year limit places the CLEC in the awkward position of marketing a product to customers when it will be unable to continue to provide the service in a relatively short time. Customers of CLECs may well feel that they have been subject to "bait and switch" tactics once they learn that the CLECs cannot continue the voicemail service after three years. In addition, CLEC customers who have grown accustomed to having voicemail from the CLEC over the three year period will experience diminished service from the CLEC when voicemail is no longer available through the CLEC and will be ripe for recruitment by Qwest.

Finally, Qwest has acknowledged that its proposal will result in additional revenue to Qwest. Therefore, it cannot be viewed as a penalty.

## **7. Promise to Add 100 Jobs in Minnesota**

Due to commitments Qwest made in the Stipulation and Agreement approved by the Commission in

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<sup>18</sup> See Commission discussion of the knowing and intentional nature of Qwest's violations, above at page 4.

the Qwest merger<sup>19</sup>, Qwest already has an outstanding commitment to add 300 new jobs in Minnesota. Compliance with that commitment has not been verified. As part of its Penalty Phase package, Qwest proposed to add an additional 100 jobs in Minnesota (50 in Duluth and 50 elsewhere). At the November 19, 2002 hearing on this matter, Qwest clarified that the 50 jobs in Duluth are jobs Qwest was planning to eliminate.

In the face of employment trends in the telephone industry, realization of the job commitments is doubtful at best. The realities of enforcing Qwest's employment pledges aside, Qwest's promise to retain 50 jobs in Duluth and add 50 jobs elsewhere in Minnesota is not logically related to undoing past discrimination and anti-competitive violations or ensuring against such illegal activity in the future. Any benefits actually realized from such a proposal (benefits to the particular workers and the communities affected) do not relate to the harms caused by Qwest's anti-competitive and discriminatory actions. They do not restore damaged CLECs or advance the competitive market in Minnesota. Provision of 100 jobs would not increase the ability of competitors to compete. Instead, the Company's gesture aimed at generating good will among its employees will increase Qwest's ability to compete. This may be a wise business decision by Qwest but it certainly is not a penalty.

## **8. Expanded DSL Offerings**

Qwest proposed to offer DSL to twelve rural exchanges of its choosing. Qwest valued its proposal to expand digital subscriber loop service (DSL) deployment at \$5 million.

The Commission favors expansion of DSL deployment to enable residential and business customers in rural exchanges to have high speed internet access. However, there are downsides to Qwest's proposal that mitigate its benefit.

First, one of the targeted exchanges (Waseca) already has DSL provided by a CLEC; at least two of the exchanges (Luverne and Albert Lea) have a CLEC competitor for high speed internet access; and all of the exchanges identified in Qwest's proposal (except Pine City) have high speed internet access available through the local cable company. The current availability of an adequate high speed internet product and consideration for the investments made by CLECs and cable operators in Minnesota diminishes the incremental value of Qwest's DSL deployment proposal.

In addition and more fundamentally, however, the record does not indicate that this or similar deployment would not have occurred anyway, regardless of the penalty phase of this proceeding. It has not been established, for example, that such deployment is not cost effective for the Company.

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<sup>19</sup> On June 28, 2000, the Commission issued its ORDER ACCEPTING SETTLEMENT AGREEMENT AND APPROVING MERGER SUBJECT TO CONDITIONS in Docket No. P-3009, 3052, 5096, 421, 3017/PA-99-1192. In that Order, the Commission approved the Stipulation and Agreement regarding the merger of the parent corporations of US West, LCI International Telecom Corp., USLD Communicating, Inc., Phoenix Network, Inc., and US West Communications, Inc.

Instead, it clearly will leave the Company in a better position to compete in the locations where deployment occurs, in response to competitive challenges in those exchanges.

Once again, therefore, it appears that Qwest's proposal to deploy DSL does not relate to mitigating or remediating the harms to CLECs or to the competitive market caused by the Company's anti-competitive and discriminatory behavior but may well exacerbate those harms.

## **9. Privacy Product to Senior Citizens**

Qwest proposed to provide its "No Solicitation" product free of charge for three years to both Qwest subscribers and CLEC subscribers that are 65 and older. The product plays a taped message at the beginning of every phone call directing solicitors to add the called number to the do-not-call list and to hang up the phone.

Several factors decrease the value of this product. Minnesota law has established a do-not-call list on which subscribers of any age can be listed for free. Telemarketers who place calls to persons on the state's do-not-call list are subject to penalties set forth in the statute. Other advantages of the state's do-not-call list over Qwest's "No Solicitation" product are: 1) the state's method does not subject all callers to the "No Solicitation" product's taped message; and 2) subscribers need not disclose their age to obtain for free the protection of the state's do-not-call list.

In addition, as a switch-based functionality, the product will only be available to those CLECs that use Qwest to perform their switching function. The product will not be available to customers of CLECs that are facility-based providers and CLECs that purchase UNEs but use their own switching. Thus, to the extent that the No Solicitation product has value, Qwest providing the product at no cost to Qwest end-use customers and customers of CLECs that use Qwest's switching functionality will disadvantage CLECs that provide their own switching. Generally speaking, measures adopted to repair damage to CLECs and the competitiveness of the market place should not favor some CLECs over others. Prejudice against CLECs who do not use Qwest's switching functionality is not warranted.

Finally, like many of the proposed "penalty" components previously addressed, offering the "No Solicitation" product free to seniors does not relate to restoring injured CLECs or to enhancing the injured competitive market. Also, like the employment promises and the proposed DSL deployment to select rural communities, the free "No Solicitation" offer to seniors appears intended to generate goodwill for Qwest in this matter rather than to provide a reasonable penalty for its illegal activity.

In sum: Based on the foregoing analysis, Qwest's proposed penalties provide for greater benefits to Qwest than to its CLEC competitors, Minnesota consumers, or the Minnesota telecommunications marketplace.

## **Factor 7: Annual Revenue and Assets of the Company Committing the Violation**

Qwest Communications International, Inc., Qwest's parent, has publicly reported annual revenues of over \$230 billion and assets of over \$74 billion for the year 2001. See ALJ Report, Finding #382,

page 53. Given these resources, the penalty assessed in this Order will not impact the Company unreasonably.

#### **Factor 8: Financial Ability of the Company to Pay the Penalty**

The ALJ noted that Qwest, including any affiliates that have 50 percent or more common ownership or that own more than 50 percent of the company, has \$20 billion in annual revenue. The ALJ found that Qwest has the financial ability to pay any fine assessed by the Commission. The ALJ cited Qwest's witness Audrey McKinney as supporting that conclusion. ALJ Report, Finding #383, page 53.

The Department observed that while Qwest has had some difficult financial times in the past for its total operations, there has been no indication that Qwest's Minnesota operations have been anything but financially successful. The Department noted that Qwest's choice to operate under an Alternative Form of Regulation (AFOR) was based on the incentive to retain revenues beyond what it would be allowed under rate of return regulation. And although Qwest's AFOR Plan protects consumers of basic service from price increases over the five-year term of the plan, the Department noted that the AFOR plan does not prevent Qwest from increasing the rates for services in the remaining two categories of services: flexibly priced and non-price regulated services. Since its AFOR was adopted, Qwest has increased the rates for various services classified as flexibly priced and non-price regulated services.

Some indication about Qwest's financial ability in the penalty phase context can be gained from the monetary valuation the Company has put on the value of its own penalty proposals. While Qwest characterized the exact dollar valuation of its proposed remedies as a trade secret, suffice to say that it is a figure substantially larger than the penalty amount assessed against Qwest in this matter.

#### **Factor 9: Other Factors - Deterrent Effect**

The Commission believes it is desirable to motivate Qwest to desist in the future from anti-competitive behavior. Many parties have identified the problem as being Qwest's view of (hence treatment of) wholesale customers as competitors to eliminate rather than as customers to serve. They have suggested that the goal must be to reform Qwest's approach, to lead it from the anti-competitive behavior identified in this and related dockets and to build a competitive environment which motivates Qwest to begin treating wholesale customers as customers rather than competitors. In that context, the Commission believes that a proper consideration in determining the size of a monetary penalty is that it be large enough to motivate abandonment of anti-competitive behavior by indicating the seriousness with which the Commission views such behavior. In addition to being consistent with the factors previously addressed, the fine must be appropriately sized 1) to clearly indicate what Qwest can expect next time if it does not abandon its anti-competitive and discriminating behaviors and 2) hence, to deter such behavior.

#### IV. APPROPRIATE CORRECTIVE ACTIONS TO BE TAKEN BY QWEST

The Commission believes that what has been most damaged by Qwest's discriminatory and anti-competitive behavior is the competitive environment in Minnesota and more concretely, Minnesota CLECs and their customers. As shown above, Qwest's proposals fail to take responsibility for its anti-competitive behavior and would further retard, rather than restore, competition in Minnesota. And while the penalty amount discussed above is warranted under the statutory considerations to punish serious knowing and intentional activity and to deter future activity of that kind, it does not directly address the key harms to competition in Minnesota identified by the Commission.

##### **Appropriate Corrective Action for Discriminatory Acts**

Local competitors and local competition that have been unquestionably harmed by Qwest's anti-competitive and discriminatory actions must be restored to the greatest extent feasible. While the Commission cannot turn back the clock and let competition proceed as it would have absent this anti-competitive activity, the Commission can take realistic steps in that direction as part of the Commission's authority to remediate the effects of Qwest's discrimination.<sup>20</sup>

Specifically, appropriate remediation requires three things.

First, Qwest must make the 26 provisions in the unfilled agreements identified in this case available to the CLECs.

Second, Qwest must allow the CLECs to experience (for a two-year period, November 15, 2000 to November 15, 2002) the savings they would have experienced, had the unfilled agreements been filed and, hence, available for them. This reasonable restoration period will strengthen them financially, allowing them to compete more vigorously. Since the money in question (money over and above the price the CLEC would have paid if it had the benefit of the best of the unfilled agreements) is money that the CLECs have already paid to Qwest, the CLECs who have overpaid due to Qwest's illegal act should receive that amount from Qwest in cash or as a credit toward future purchases, whichever the CLEC chooses.

Third, Qwest should allow CLECs to purchase services from Qwest at the same price that would have been available to them under their choice of the unfilled agreements for a 24-month period, beginning with the date of this Order.

The second and third requirements cover a 48 month period altogether, which is reasonable, given that the length of the most favorable of the unfilled agreements (hence the length of the agreements that the CLECs would have chosen) was 5 years and 6 weeks. Had these agreements been filed (made public) as the law required, other CLECs would have been able to adopt them for the same time period.

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<sup>20</sup> Minnesota's anti-discrimination statutes, Minn. Stat. §§ 237.09, 237.60, subd. 3, and 237.121, subd. 5.



There are two exceptions to the second and third requirements. Two CLECs, Eschelon and McLeod, were the beneficiaries of the two most favorable unfilled agreements. They participated in and benefitted from Qwest's illegal activity and were prepared to do so for the full length of their agreement. Moreover, when the Department brought these agreements to light and Qwest terminated their agreements, they received substantial buy-out payments from Qwest.

In these circumstances, these two CLECs have already received the discount benefits applicable to their purchases between November 15, 2000 and November 15, 2002 and should not be allowed to experience discounts on future purchases (during the 2-year period available to other CLECs under this Order) until they (McLeod and Eschelon) purchase services from Qwest for which the discount amounts (not available to them but computed in a tracker account) equal the amount of the contract termination payments received from Qwest.

## **V. OPPORTUNITY TO STAY PENALTY**

Finally, the Commission's authority to order the foregoing three-steps to remedy Qwest's discriminatory action is clear. In addition, the monetary penalty assessed is appropriate based on the factors discussed in this Order. Nevertheless, practical public policy considerations incline the Commission to believe that the significant and warranted fine assessed in this Order should be coupled with the possibility of avoiding it if Qwest agrees to take and does take the appropriate three-step corrective (market-remediative) actions previously identified. This opportunity is provided to Qwest based on the Commission's preference for an outcome to this matter that restores the local competitive market in Minnesota most directly and efficiently.

## **VI. RIGHT TO REVIEW**

A penalty imposed under Minn. Stat. § 237.462 shall not be payable sooner than 31 days after the Commission issues its *final order assessing the penalty*. The person subject to the penalty may appeal the Commission's penalty order under sections Minn. Stat. §§ 14.63 to 14.68. If the person does appeal the Commission's penalty order, the penalty shall not be payable until either all appeals have been exhausted or the person withdraws the appeal. Minn. Stat. § 237.462, subd. 5.

## **ORDER**

1. Qwest shall pay a penalty of \$25,955,000, calculated at the rate of \$10,000 per penalty day for the Eschelon IV and McLeod III unfilled agreements, and at the rate of \$2,500 per penalty day for the 10 other unfilled agreements.
2. Qwest shall make all 26 provisions of the unfilled agreements at issue in this matter available to the CLECs for the length of time they were offered to the CLEC signatory to the unfilled provision in question. That is, each CLEC will be able to determine which of the 26 provisions it wants to be part of its interconnection agreement with Qwest. Provided, however that Eschelon and McLeod's adoption of the discount provisions is subject to Order Paragraph 6 below.

- 3a. Qwest shall give, either in cash or by credit at the CLEC's choice, the equivalent of a 10% discount on all Minnesota products and services that the CLEC purchased from Qwest between November 15, 2000 and November 15, 2002. Services covered are those stated in Eschelon IV, Paragraph 3: all purchases made by Eschelon from Qwest, including but not limited to switched access fees and purchases of interconnection, UNEs, tariffed services, and other telecommunications services covered by the Act. This is the equivalent of giving them the benefit of the Eschelon IV price for a 24 month period starting on November 15, the day the Eschelon IV agreement became effective.
- 3b. Qwest shall also give, in cash or by credit against future purchases at the affected CLEC's choice, \$2 per access line purchased during the time Eschelon V, paragraph 5 was in effect. This is the equivalent of giving them the benefit of Eschelon V, paragraph 5.
- 3c. For each month that Qwest did not provide accurate daily usage information to a CLEC (other than Eschelon) during the time that Eschelon IV, paragraph 2 was in effect, Qwest shall give that CLEC a \$13 credit for each platform line ordered by the CLEC during that time period. This is the equivalent of giving them the benefit of Eschelon IV, paragraph 2.
- 3d. For each month that Qwest did not provide accurate daily usage information to a CLEC (other than Eschelon) during the time that Eschelon V, paragraph 3 was in effect, Qwest shall give that CLEC a \$16 credit for each platform line ordered by the CLEC during that time period. This is the equivalent of giving them the benefit of Eschelon V, paragraph 3.
4. Qwest shall give a 10% discount on all Qwest products and services provided in Minnesota to each Minnesota CLEC during a 24-month period commencing on the date of this Order. This is the equivalent of giving them the benefit of Eschelon IV, paragraph 5 except that the services for which the 10% discount is available under this Order is limited to services in Minnesota.
5. The monetary penalty assessed in Order Paragraph 1 above will be stayed if Qwest undertakes to comply with Order Paragraphs 2, 3a-d, and 4. The penalty shall be permanently stayed upon completed compliance with Order Paragraphs 2, 3a-d, and 4.
6. Eschelon and McLeod shall not be eligible for payments or credits under Order Paragraphs 3a-d. And, in view of contract termination amounts received from Qwest as compensation for the value of their terminated agreements, they shall be ineligible for the 10% discount under Order Paragraph 4 until they have purchased from Qwest services whose 10% discounts (if given) equal the amount of any such payments.

7. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar  
Executive Secretary

(S E A L)

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